IN THE

Supreme Court of the United States

..... Term, 1942

No.....

LEHIGH VALLEY RAILROAD COMPANY OF PENNSYLVANIA, A CORPORATION, AND BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AN UNINCORPORATED ASSOCIATION,

Petitioners

vs.

PATRICK J. DOOLEY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY COURT OF ERRORS AND APPEALS

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The Lehigh Valley Railroad Company of Pennsylvania and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, pray that a writ of certiorari issue to review a certain final decision of the New Jersey Court of Errors and Appeals, being the highest court of said state of New Jersey, in the above entitled cause, said decision of said court having been rendered and filed on April 23, 1942, affirming the decree of the Court of Chancery below.

OPINIONS BELOW

The opinion of Vice-Chancellor Egan, in Chancery of New Jersey, is reported in 130 N. J. Eq. 75. The *per curiam* opinion of the New Jersey Court of Errors and Appeals (R. 383-384) has not yet been reported.

JURISDICTION

The decision of the New Jersey Court of Errors and Appeals was rendered and filed on April 23, 1942. The jurisdiction of this court is invoked under Section 237 of the Judicial Code as amended (28 U. S. C. 344).

QUESTIONS PRESENTED

1. Whether the right of employees to organize and bargain collectively as provided in Section 2 Fourth of the Railway Labor Act is impaired or denied by a decree enjoining the abrogation of a collective bargaining contract between a carrier and a defunct labor organization which has ceased to represent or to claim to represent, such em-employees.

2. Whether Section 2 Ninth of the Railway Labor Act requires an election under the auspices of, and certification by, the National Mediation Board as a prerequisite to the right of an organization to act as collective bargaining representative for a carrier's employees, in instances where no dispute exists as to such representation.

3. Whether the right of a carrier and its employees under Section 2 First and Second of the Railway Labor Act to settle all disputes is denied or impaired by a decree holding null and void an agreement between a carrier and the collective bargainng representative of its employees in settlement of a dispute.

4. Whether a statement by the highest court of a State that its decision does not involve the determination of a

federal question can deprive this court of its power of review under Section 237 of the Judicial Code when in fact the statement of the highest court of the state is erroneous and a federal question was necessarily determined.

GROUNDS FOR APPLYING FOR WRIT

1. The questions presented in this case are new and have not been determined by any other court. The case presents questions of Federal law which are of vital importance to the successful operation of the Railway Labor Act of 1934, and it is a matter of public importance that these questions be determined by this court.

2. The effect of the decision of the New Jersey Court of Errors and Appeals will be to invalidate in the State of New Jersey many collective bargaining agreements executed in compliance with the Railway Labor Act of 1934, and to deprive all railroad employees in that state of rights guaranteed to them by that Act.

3. The rights of the petitioners herein, and the public interest in the efficient and uninterrupted operation of railroad transportation, are seriously impaired by the decision of the New Jersey Court of Errors and Appeals.

STATUTES INVOLVED

Excerpts From the Railway Labor Act of 1934 as Amended

"General Purposes"

"Sec. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete

independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." (Railway Labor Act, Section 2, General Purposes; U. S. C. Title 45, Section 151a.)

"General Duties"

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (Railway Labor Act, Section 2 First; U. S. C. Title 45, Section 152 First.)

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute." (Railway Labor Act, Section 2, Second; U. S. C. Title 45, Section 152 Second.)

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representatives of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organiza-

tion of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization." (Railway Labor Act, Section 2, Fourth; U. S. C. Title 45, Section 152 Fourth.)

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any

election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph." (Railway Labor Act, Section 2, Ninth; U. S. C. Title 45, Section 152 Ninth.)

STATEMENT

The petitioner Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, an unincorporated association, is a standard railroad labor organization, affiliated with the American Federation of Labor.

The petitioner Lehigh Valley Railroad Company of Pennsylvania, is a corporation, a common carrier by railroad in interstate commerce, and is a "carrier" subject to the provisions of the Railway Labor Act of 1934.

The respondent, Patrick J. Dooley, is, or was at the time of the commencement of this action, an employee of petitioner Railroad and a member of petitioner Brotherhood.

The facts material to a determination of this case are as follows:

For many years the Railroad has engaged in collective bargaining with its employees. Prior to 1937 its clerical employees were represented by an independent labor organization known as "The Association of Lehigh Valley Railroad Clerks" (hereinafter referred to as the Association). This Association entered into certain collective bargaining agreements with the Railroad which provided,

among other things, for the existence of seniority rights among the employees. The first of these agreements became effective in 1923 (Exhibit C-1, R. 249-271, offered in evid. R. 23), and continued until 1935. The second was effective in 1935 and thereafter. (Exhibit C-3, R. 274-305, offered in evid. R. 23)

The respondent Dooley, entered the service of the Railroad as a yard clerk on December 10, 1926, and worked as such until October 5, 1932, when he resigned. He was reemployed as a clerk on April 15, 1933, and has worked regularly in various capacities to the present date (R. 26).

John A. Trainor entered the service as a clerk, November 9, 1923; James Coffey on December 20, 1925; and Hans J. Peterson on June 9, 1925 (R. 26-27). These three men worked on Pier 8 in New York City (R. 29, 41 and 48), where the business of the Railroad was the handling of freight exclusively for the Universal Carloading and Distributing Company (hereinafter referred to as the Universal) (R. 48-49). On or about February 1, 1932, the Railroad and the Universal entered into an agreement under which the Universal performed the work previously done by the Railroad (R. 205). Trainor, Coffey and Peterson continued to do the same type of work, but after February 1, 1932, received their pay from the Universal rather than the Railroad (R. 33, 42 and 45); and the Court of Chancery held that they entered the employ of the Universal on that date (R. 222).

The contract between the Railroad and the Universal expired in 1936, whereupon Trainor, Coffey and Peterson, through the Association, sought reemployment with the Railroad with reinstatement and restoration of their previously held seniority rights (R. 222). The Association was unsuccessful in its efforts on behalf of these men (R. 205).

During or about the year 1933, the Brotherhood, petitioner here, became active among the employees of the Railroad and established an organization for such employees headed by one Buckley, who held the title of General Chairman of the System Board of Adjustment of the Brotherhood (R. 149). The Brotherhood interested itself in the plight of Trainor, Coffey and Peterson (who were all members of both the Brotherhood and the Association) and Buckley attempted to take up the matter of restoration of their seniority rights with the General Manager of the Railroad (Exhibit DA-1, R. 377, offered in evid. R. 156). The General Manager refused to entertain Buckley's request on the ground that the Brotherhood did not represent these employees and that the subject matter was then being handled with him by the representatives of the Association (R. 205; Exhibit DA-2, R. 378, offered in evid. R. 157).

Inasmuch as the Brotherhood claimed to represent the clerical and certain other employees of the Railroad, and this claim was not recognized by the Railroad, which maintained that the Association was the representative of these employees, the Brotherhood, on April 19, 1937, invoked the services of the National Mediation Board to settle the dispute (Exhibit C-21, R. 350, offered in evid. R. 172). The Board took jurisdiction and put in motion the procedure adopted by it for the settling of such disputes. Mediator Harvey began an investigation on May 18, 1937, and continued until June 5, 1937. The investigation developed that there was a representation dispute between the Brotherhood and the Association as to who was the duly designated and authorized representative of the clerks and other office and station employees of the Railroad for the purposes of the Railway Labor Act.

On June 8, 1937, a hearing was held by the Mediation Board concerning the question as to whether the employees

involved constituted one or two crafts or classes of employees. The Brotherhood, in invoking the services of the Board, had claimed the right to represent all of the "Clerks and Other Office and Station Employees" of the Railroad (Exhibit C-21, R. 350, offered in evid. R. 172). On June 14th, the Mediation Board issued a "Findings to Determine Eligible List" as a result of the public hearing, in which it was found that the entire group of Clerical, Office, Station and Storehouse Employees of the Railroad constituted a single class or craft of employees for the purposes of representation under Section 2 Ninth of the Railway Labor Act (Exhibit C-21, R. 351, offered in evid. R. 172).

With this question decided, and while preparations for an election were being made by Mediator Harvey, he was advised by the parties to the dispute, under date of June 22, 1937, that they had disposed of the question, and under date of June 29, 1937, a letter was addressed to the Board by Mr. George M. Harrison, Grand President of the Brotherhood, advising that all differences in this dispute had been composed by the parties to the dispute, and withdrawing the request of his organization for further investigation by the Board. On the basis of the letter referred to, the National Mediation Board then dismissed the proceedings (R. 205; Exhibit C-21, R. 351-352, offered in evid. R. 172).

On June 23, 1937, the Brotherhood was recognized by the Railroad as collective bargaining representative of its clerical employees. The Brotherhood took over and maintained in effect the existing agreement between the Railroad and the Association (Exhibit C-3, R. 274-305, offered in evid, R. 23), until March 1, 1939, when a new agreement was made between the Railroad and the Brotherhood.

On June 26, 1937, in view of the Railroad's recognition of the Brotherhood as representative of its clerical employees, Buckley again took up, with the Railroad, the

grievances of Messrs. Trainor, Coffey and Peterson (Exhibit DA-3, R. 379-380, offered in evid. R. 158). Subsequently, on September 22, 1937, an agreement was reached which provided that the seniority of these three men should be considered as dating from the time of their original employment by the Railroad, with the proviso, however, that they would not be allowed to exercise that seniority for the purpose of displacing any active employee, but would only be permitted to use it in "bidding-in" positions which had become vacant (Exhibit DA-5, R. 382, offered in evid. R. 161). It is this agreement which was attacked by the respondent, Dooley.

Respondent protested the restoration of seniority rights to these three men to the local lodge of the Brotherhood. On October 21, 1937, the Lehigh Valley Black Diamond Lodge No. 847, of the Brotherhood, in conformity with the constitution of the Brotherhood, applied to the Grand President for leave to circulate a petition of protest against Chairman Buckley's action in restoring the original seniority of the three men. A petition to such effect was circulated and signed by 144 members of the Brotherhood. The Grand Lodge officials failed to act on the petition, and an appeal was taken to the System Board of Adjustment, which likewise upheld the agreement effectuated by Buckley. An appeal was then taken to the Grand President who sustained the System Board. Respondent also personally appealed to the Grand President, who, after an investigation, upheld Buckley (R. 207).

The constitution and laws of the Brotherhood then in effect provided for a further appeal, from decisions of the Grand President to the Grand Executive Council. No proper appeal therefrom was ever taken by respondent or by any local lodge of the Brotherhood (R. 155).

On July 10, 1940, respondent instituted suit in the New Jersey Court of Chancery asking an accounting of financial

losses sustained by him as a result of the restoration of the seniority of Trainor, Coffey and Peterson, and a recovery of such allegedly lost earnings. Respondent also asked that the agreement reinstating the seniority rights of these men be declared null and void and of no effect; that petitioner Railroad be ordered to restore respondent's name on the seniority roster in the same position as it would have been had this agreement not been entered into; that he be accorded the rights of employment to which he would be entitled by such position; that the names of Trainor, Coffey and Peterson be entered on the roster as of the date of their reemployment; and that an injunction issue against the petitioners restraining them "from violating their aforesaid agreements or doing any act whatsoever tending to cause a violation thereof by any of the parties thereto" (R. 6-7). On September 10, 1940, both petitioners filed answers (R. 8, 13) and on September 19, 1940, the replication of respondent, joining issue on the answers, was filed (R. 17). After hearing, the Court of Chancery, on July 28, 1941, filed an opinion (R. 201) holding that respondent was entitled to the relief prayed for in the bill.

On September 12, 1941, the Court of Chancery entered a final decree (R. 221) making findings of fact and granting relief. The court found in the decree that "the action of the defendant Brotherhood in interceding for John Trainor, Hans Peterson and James Coffey, and in obtaining their reistatement with a restoration of their original seniority rights was wholly unwarranted as the said defendant Brotherhood was never designated or elected as the bargaining agent and it was in violation of the provisions of the agreement effective April 1, 1935 (R. 224-225). The court further found that respondent was not entitled to an accounting, but was entitled to the other relief prayed for in the bill of complaint (R. 225-226).

Pursuant to the findings aforesaid, the Court of Chancery ordered, adjudged and decreed:

1. That the agreement restoring the seniority of Trainor, Coffey and Peterson be set aside and held to be null and void.

2. That the Railroad hold vacant and readvertise the positions held by these three men, in accordance with the agreement of April 1, 1935, between the Railroad and the Association.

3. That the Railroad place the names of these three men on the seniority roster as of the dates of their re-employment.

4. That the Railroad be enjoined from breaching or abrogating the terms of the agreement of April 1, 1935, with the Association, "while such agreement remains in full force and virtue."

5. That the Brotherhood be perpetually enjoined from doing any acts injurious to the rights of respondent and other clerical employees of the New York Division of the Railroad similarly situated under "the existing contract of employment" between the Railroad and its clerks and other office and station employees "represented by the Association of Lehigh Valley Clerks"; and from persuading or attempting to persuade the Railroad to breach or disregard the provisions of said agreement (R. 226-227).

The New Jersey Court of Errors and Appeals in a *per curiam* decision filed April 23, 1942, affirmed the decree of the Court of Chancery "for the reasons expressed by Vice-Chancellor Egan in his opinion reported in 130 N. J. Eq. 75" (R. 384). In its decision, the court stated that the question of the right of John J. Buckley, General Chairman of the System Board of Adjustment of the Brotherhood, and of the Brotherhood itself, to represent the Clerks as bargaining agent with the employer Railroad, which ques-

tion was discussed in the Vice-Chancellor's opinion, was not considered necessary to the determination of the case, and that it consequently expressed no opinion thereon (R. 384).

SPECIFICATION OF ERRORS TO BE URGED

The New Jersey Court of Errors and Appeals erred:

1. In affirming a decree enjoining the Lehigh Valley Railroad Company from abrogating the terms of a collective bargaining contract made with an organization which is not now in existence and which has not since the year 1937 even claimed the right to represent employees of this Railroad, thereby denying or impairing the right of these employees under Section 2 Fourth of the Railway Labor Act to organize and bargain collectively through representatives of their own choosing.

2. In affirming a decree based upon a holding that Section 2 Ninth of the Railway Labor Act requires an election under the auspices of, and certification by, the National Mediation Board, as a prerequisite to the right of an organization to act as collective bargaining representative for a carrier's employees, when no dispute existed as to who was entitled to so represent such employees.

3. In affirming a decree which declared null and void an agreement entered into in good faith by a carrier and the representatives of its employees for the purpose of settling a dispute pursuant to the provisions of Section 2 First and Second of the Railway Labor Act.

4. In holding that the question of representation for purposes of collective bargaining under the Railway Labor Act was not necessary to the determination of this case.

5. In affirming the decree of the Court of Chancery below.

REASONS FOR GRANTING THE WRIT

This case presents important new questions of federal law of vital importance to the successful operation of the Railway Labor Act. The questions presented concern the proper construction of the Railway Labor Act, and, in the national public interest, should be settled by this court. The decision of the New Jersey Court of Errors and Appeals, affirming the decree in Chancery of New Jersey, should be reviewed by this court because:

1. The effect of the decree affirmed by the highest court of the State of New Jersey is to deny or impair the right of employees of the Lehigh Valley Railroad Company "to organize and bargain collectively through representatives of their own choosing," a right guaranteed to them by Section 2 Fourth of the Railway Labor Act, in that the decree enjoins the Lehigh Valley Railroad Company from abrogating the terms of an agreement made with an organization which, since the year 1937, has been non-existent and has not claimed the right to represent employees of the Lehigh Valley Railroad Company.

2. The decree which has been upheld in the New Jersey courts is based upon a construction of Section 2 Ninth of the Railway Labor Act to the effect that an organization may not act as the collective bargaining representative for employees of a carrier until it has been certified as such representative by the National Mediation Board; a construction which, if adopted, would fatally disrupt labor relations and the collective bargaining process in the railroad industry on a nation-wide basis, and impair the right guaranteed by Section 2 Fourth of the Railway Labor Act, of the majority of any craft or class of employees to "determine who shall be the representative of the craft or class for the purposes of this Act."

3. The decree operates to impair the right and duty of both the Lehigh Valley Railroad Company and its employees "to settle all disputes, whether arising out of the application of such agreements or otherwise," a duty imposed by Section 2 First and Second of the Railway Labor Act, by holding the agreement made on September 21, 1937, between the Railroad and the Brotherhood, settling the dispute over seniority rights of Messrs. Trainor, Peterson, and Coffey, to be null and void.

4. The New Jersey Court of Errors and Appeals could not divest this court of its jurisdiction, under Section 237 of the Judicial Code, as amended (28 U. S. C. 344), to grant the prayer of this petition, by stating in its opinion that the question of representation under the Railway Labor Act, the federal grounds relied upon here, by petitioners, was not necessary to the determination of this case; for in fact the decision of the New Jersey Court of Errors and Appeals affirmed a decree based entirely upon a determination that the Brotherhood, petitioner here, was not qualified, under the terms of the Railway Labor Act, to act as collective bargaining representative for the employees of the Lehigh Valley Railroad Company, the decree not stating any substantial non-federal grounds upon which it could be based. (U. S. C. Title 45, Section 151 *et seq.*).

The Railway Labor Act of 1934 was designed to prevent interruptions to commerce and to the operation of carriers engaged in commerce by setting up certain machinery and rules which it was hoped would provide more harmonious relations between labor and management in the railroad industry. Specifically, the purposes of the Act were to foster freedom of association and self-organization on the part of employees, "to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions," and "to provide for the

prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions." (Railway Labor Act, Section 2 "General Purposes," U. S. C. Title 45, Section 151a.) Section 2, Fourth of the Railway Labor Act gives employees "the right to organize and bargain collectively through representatives of their own choosing," and provides that "the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." Nothing in this section provides that the choice of the majority of the craft or class shall be exercised or expressed in any particular manner. Section 2 Ninth provides that in the event of a dispute as to representation, and upon the request of either party to such dispute, the Mediation Board shall investigate the dispute and certify the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute. Section 2 Ninth also states that in such an investigation the Mediation Board "shall be authorized" to take a secret ballot, or "to utilize any other appropriate method" of ascertaining the proper representative of the employees involved. There is nothing in the Railway Labor Act which requires a representative to be certified as such by the National Mediation Board, except where a representation dispute exists and at the request of a party involved in such dispute. The Act nowhere requires that the wishes of employees as to whom they wish to represent them be ascertained by an election under the auspices of the National Mediation Board, and the very language of the Act negatives any inference of the existence of such a requirement.

1. The Decision of the New Jersey Court of Errors and Appeals Operates to Deny to Certain Employees of the Lehigh Valley Railroad Company the Right to Bargain Collectively

The effect of the New Jersey court's decision is truly astonishing. It expressly requires that labor relations between the Lehigh Valley Railroad Company and the particular group of its employees involved in this case be governed by an agreement with an organization which does not represent, nor purport to represent, these employees and whose present existence is not evidenced by anything in the record of this case. This aspect of the decision alone constitutes a denial to these employees of the right to organize and bargain collectively. The decree, affirmed by the New Jersey Court of Errors and Appeals, enjoins the Railroad from breaching or abrogating this old agreement, "while such agreement remains in full force and virtue," and enjoins the Brotherhood from persuading or attempting to persuade the Railroad to breach or disregard the provisions of the agreement. (R. 227.) It would seem that the only way in which these employees can be freed from the shackles of a "frozen" set of rules and working agreements is to reorganize this defunct Association, and proceed to bargain with the Railroad through it. The decision of a court creating such a situation, undeniably operates to impair or deny freedom of self-organization of employees and freedom to choose a collective bargaining representative.

The theory of representation of employees by a labor organization is essentially democratic. The organization is supposed to act on behalf of the employees, not dominate them. If a particular organization proves unsatisfactory to the employees, it is their prerogative to select a different organization to represent them. The decree of the New

Jersey Court of Errors and Appeals removes this prerogative in requiring the employees of the Lehigh Valley Railroad to look to only one organization to represent them.

But the decree goes even further in imposing restraints upon the collective bargaining process. Even assuming that the Brotherhood could at some future time, by some process not foreseen by the New Jersey courts, and without violating the decree, become reinstated as the collective bargaining representative of these employees, it would still be hampered by the decree. This decree, affirmed by the highest court of the State of New Jersey, *perpetually and permanently* enjoins and restrains the Brotherhood "from doing any act injurious to the rights of the complainant and other clerical employees of the New York Division of the Railroad similarly situated under the existing contract of employment between the Lehigh Valley Railroad and its clerks and other office and station employees represented by the Association of Lehigh Valley Clerks * * *." (R. 227.) On its face, this decree purports to fix for all time the rights of certain individuals, at least as against this Brotherhood. Assuming that this Brotherhood is declared to have the right to represent these men, or that at some future time it might secure this right, the fallacy of such a fixation of rights becomes immediately apparent.

It is generally recognized that a labor union, in the course of collective bargaining and for the general welfare and best interests of its membership, may be faced with the necessity of making agreements derogatory to certain individuals among the employees which it represents. *Hartley vs. Brotherhood of Railway and Steamship Clerks,* 283 Mich. 201, 277 N. W. 885; *O'Keefe vs. Local 463,* 277 N. Y. 300, 14 N. E. (2d) 77; *Donovan vs. Travers,* 285 Mass. 167, 188 N. W. 705; *George T. Ross Lodge vs. Brotherhood of Railroad Trainmen,* 191 Minn. 373, 254 N. W. 590;

Aulich vs. Craigmyle, 284 Ky. 676, 59 S. W. (2d) 560; 117 A. L. R. 823.

It would appear, then, that the decree effectively cripples the Brotherhood with respect to its ability to act as collective bargaining agent for these employees at any time in the future. To require the consent and approval of each individual employee to every collective bargaining agreement would be to put an end to the collective bargaining process. Yet so far as this Brotherhood is concerned, the decree imposes just such a requirement when it enjoins the Brotherhood from doing any acts injurious to a certain class of employees.

We submit, then, that the decree in effect blacklists the Brotherhood, a standard railroad labor organization; that it requires employees to bargain collectively, at least temporarily, through a labor organization which they do not desire to represent them and which is now defunct; and that it impairs the proper functioning of the institution of collective bargaining. Such a decree should not be permitted to stand.

2. The Decision of the New Jersey Court of Errors and Appeals Adopts an Erroneous Construction of the Railway Labor Act, in Holding That Certification by the National Mediation Board Is a Prerequisite to the Right to Represent Employees of a Carrier

The decree affirmed by the New Jersey Court of Errors and Appeals contains the following statement with respect to the question of certification:

> "The Mediation Board never certified the defendant Brotherhood as the bargaining agent for the clerical employees of the defendant Railroad. Under the circumstances it was without authority to intercede or act in any manner to restore the seniority rights of Coffey, Trainor and Peterson." (R. 225.)

The whole decree appears to be based solely upon this finding of the trial court that the Brotherhood was not certified as the collective bargaining representative of these employees, and hence had no right to represent them.

Such a construction of the Railway Labor Act, making certification by the Mediation Board a prerequisite to the right to represent employees of a carrier, would result in widespread confusion in the railroad industry as a whole. Many organizations now acting as collective bargaining representatives of railroad employees have never been certified as such by the National Mediation Board. If the construction given the Railway Labor Act by the New Jersey courts were allowed to prevail, every act, every contract entered into, by these organizations since the Act became effective would be null and void. If such a situation came to pass, the task of determining the rights of railroad employees represented by these organizations would assume staggering proportions. For example, all seniority rights which accrued under contracts negotiated by these organizations would be wiped out. All employees represented by such organizations would immediately be deprived of representation.

Moreover, it would appear to be impossible for these organizations to secure the required certification by the National Mediation Board in the absence of any representation dispute among the employees whom they have represented. The decree of the New Jersey courts contains no suggestion as to how certification could be obtained. Does the decree contemplate that disputes should be fomented in order to secure investigation by the Mediation Board?

Such is the situation in which the Lehigh Valley Railroad Company and its employees are placed by this decree. The Railroad cannot bargain with the Brotherhood because

of the prohibition of the decree, and there is no other organization which even claims to represent the employees. It cannot invoke the jurisdiction of the National Mediation Board under Section 2 Ninth of the Railway Labor Act because there is no representation dispute, no one other than the Brotherhood claiming to represent these employees. Thus, the Railroad cannot comply with the public policy enunciated by Congress and collectively bargain with its employees and the employees are deprived of the benefits of the collective bargaining process.

However, it is the contention of the petitioners before this court that the Railway Labor Act is not susceptible of the interpretation given to it by the New Jersey courts, either by reason of the language of the Act itself or previous judicial interpretation of the Act. Under Section 2 Fourth, the majority of any craft or class of employees is given the right to select a representative for the whole craft or class. No restriction is placed upon this right by the statute. Moreover, it would appear that under the terms of Section 2 as a whole, where employees have selected a certain representative and that fact is undisputed, the carrier is obligated either to bargain collectively with that representative or to subject itself and its officers to the severe penalties set up in Section 2 Tenth. This is apparent from an examination of Section 2 Ninth. The whole procedure set up therein for investigations by the Mediation Board is predicated upon the existence of a dispute "among a carrier's employees" as to who are their representatives. The carrier itself is given no right to appeal to the Mediation Board to determine the choice of its employees as to representation.

The very language of the first sentence of Section 2 Ninth of the Railway Labor Act negatives any inference that in the absence of a representation dispute among a

carrier's employees, the Mediation Board has any authority or duty to conduct investigations, hold elections or certify representatives. This sentence reads as follows:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees *designated and authorized in accordance with the requirements of this Act,* it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier." (Emphasis supplied.)

The words italicized in the above quotation clearly point to some method of designation and authorization outside the scope of Section 2 Ninth. They indicate that the purpose of Section 2 Ninth is to provide, in disputed cases, a method of ascertaining the true facts of a situation or status already existing, and not to create or alter such situation or status. Since Section 2 Ninth is the only portion of the Act providing for certification by the Mediation Board, by its very terms it applies to the exceptional and not the normal situation. It is clear that, in the absence of a representation dispute, the method and requirements for selecting collective bargaining representatives must be found outside Section 2 Ninth, and elsewhere in the Act. The only such requirement is set up in Section 2 Fourth, to the effect that representatives are to be chosen by the majority of any craft or class of employees.

In cases arising under the National Labor Relations Act, the question as to whether a union must be certified by the Board to act as collective bargaining agent for employees has been considered, and decided favorably to the positions taken here by the petitioners. Section 9(a) of

the National Labor Relations Act is similar to Section 2 Fourth of the Railway Labor Act, and Section 9(c) corresponds to Section 2 Ninth of the Railway Labor Act.* In speaking of an employer's duty to bargain with a labor union which had not been certified as bargaining agent by the National Labor Relations Board, the court, in the case of *National Labor Relations Board vs. Remington Rand, Inc.,* 94 Fed. 2d 862 (C. C. A. 2d 1938) had the following to say:

> "The Labor Board does indeed have that power, Section 9(c), 29 U. S. C. A. Sec. 159(c), and when there is a real doubt, we may assume *arguendo* that the employer need not decide the issue at his peril; faced by two sets of putative representatives, each claiming to be the properly accredited one, it would seem fairly plain that he need not choose at his peril, especially if he is not allowed to take a vote himself. The same is equally true, though only one set makes the claim; he may be in genuine doubt how many it represents. If he cannot satisfy himself of their credentials and if he cannot by informal appeal to the Labor Board invoke its power, it would certainly seem that he should be free not to recognize either; but from that immunity *it does not in the least follow that he need be satisfied with no evidence except the Board's certificate; it may be entirely apparent from other sources that one set really represents the majority.*" (Italics supplied.)

*The paragraphs of the National Labor Relations Act referred to read as follows:

"(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain (*sic*) such representatives." (U. S. C. Title 29, Sec. 159(a) and (c).)

The final disposition of the above cited case may be found in the holding of this court, reported at 304 U. S. 576, in which *certiorari* was denied.

In a holding similar to that in the case just under discussion, an order of the National Labor Relations Board was upheld and the following statement made by the court:

> "The evidence also supports the finding that respondent unlawfully refused to bargain collectively. *The contention that bargaining was not mandatory until the Board had accredited Local No. 307 as bargaining agent is frivolous. An employer is under a duty to bargain as soon as the union representative presents convincing evidence of majority support.*" (Italics supplied.) *National Labor Relations Board vs. Dahlstrom Metallic Door Co.,* 112 Fed. 2d 756 (C. C. A. 2d, 1940).

To sustain its holding in this case the New Jersey Chancery Court argues that according to Section 2 Ninth of the Railway Labor Act, an organization which is not certified by the Mediation Board may not succeed another organization as the collective bargaining representative of a carrier's employees. With this proposition we are thoroughly in accord, provided it be conditioned upon the existence of a dispute as to who shall be the bargaining agent. We do not agree with this proposition when, as here, there is only one claimant to the title of "bargaining agent." At the time the Lehigh Valley Railroad Company recognized this Brotherhood as bargaining agent, there was no longer any dispute. This fact is clearly evidenced by the absence of any showing that, from that time until the institution of this suit, any person or organization protested the Mediation Board's discontinuance of its investigation or made any claim that the Brotherhood did not represent these employees. Now for the first time since 1937, this suit collaterally attacks the Brotherhood's status as collective bargaining representative.

The cases cited by the New Jersey Chancery Court in support of its position involve either actual representation disputes, or factual situations not in point here.

In concluding our discussion of this particular point we wish to state that the language of the Railway Labor Act is clear and explicit, to the effect that a majority of any craft or class of employees is to control in the selection of representatives. If the wishes of a majority are otherwise known, there is no need to invoke the services of the National Mediation Board, and the statute does not require that the Board conduct an election or issue a certification. This conclusion is supported by the cases cited above dealing with corresponding provisions of the National Labor Relations Act. It is, therefore, respectfully submitted that on this point the construction given the Railway Labor Act by the highest court of the State of New Jersey is erroneous.

3. The Decree Operates to Impair the Right and Duty Under Section 2 First and Second of the Railway Labor Act of Both the Lehigh Valley Railroad Company and Its Employees to Settle All Disputes

The decree of the New Jersey Chancery Court, affirmed by the New Jersey Court of Errors and Appeals, contains the following order:

> "1. That the agreement made on September 21, 1937, between the Railroad and John J. Buckley, chairman of the defendant Brotherhood's System Board of the Lehigh Valley Railroad, restoring the original seniority rights to John Trainor, Hans Peterson and James Coffey, as of November 11, 1923, August 1, 1925, and September 30, 1925, respectively, be and the same hereby is set aside and held to be null and void." (R. 226.)

We have shown that the construction given the Railway Labor Act by the New Jersey courts was erroneous

with respect to the question of representation and that under a proper construction of that Act the Brotherhood, petitioner here, had the right to represent and bargain for these employees of the Lehigh Valley Railroad. It is further our contention that the portion of the decree above quoted denies rights guaranteed to both the Brotherhood and the Railroad by Section 2 First and Second of the Railway Labor Act.

These portions of the Act not only confer a right, but also impose a duty, on a carrier and its employees, to make every effort to settle all disputes between them. This is clearly shown by the decision of this court in the case of *Virginian Ry. Co. vs. System Federation No. 40,* 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 43. In that decision this court, referring to the Railway Labor Act, made the following statement:

> "The statute does not undertake to compel agreement between employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by Section 2 First." (P. 548.)

If, in the exercise of the rights, and the performance of the duties, provided for in Section 2 First and Second of the Act, a carrier and the representative of its employees have entered into an agreement settling a dispute, then the decree of a state court nullifying that agreement would appear to constitute a denial and an interference with the exercise of rights and the performance of duties, which rights and duties exist by reason of a statute of the United States. This is the situation in the instant case, and for the reasons indicated above, we respectfully submit that

this court should not allow the decree of the New Jersey Court of Errors and Appeals to stand. There is nothing in the record of this case to show any fraud or other misconduct by the parties to the agreement held null and void by the New Jersey courts which could operate to deprive that agreement of the protection accorded to such agreements by the Railway Labor Act.

Moreover, there is nothing in the record of this case which furnishes any ground upon which this court could hold the agreement invalid. The contention was advanced by the trial court that the agreement was arbitrary and could not be sustained for the reason that it did not conform to the terms of a previous collective bargaining agreement (R. 214; 224-225). In terms of general contract law this contention is without merit. The parties to a contract may, as a general rule, voluntarily modify or abrogate its terms, by subsequent agreement. The agreement in question here was entered into to settle a dispute or grievance. If all labor disputes could only be settled within the scope of a pre-existing agreement, many disputes would never be settled. Such a strict limitation upon the process of settling disputes clearly was not contemplated by the Railway Labor Act. Section 2 First of the Act is very broad in its terms, and imposes the duty "to settle *all* disputes, *whether arising out of the application of such agreements or otherwise,* in order to avoid any interruption to commerce or to the operation of any carrier growing out of *any dispute* between the carrier and the employees thereof." (Emphasis supplied.)

Many cases have arisen involving collective bargaining agreements, some of which were and some of which were not controlled by or entered into pursuant to the terms of the Railway Labor Act. The general rule with respect to all of these agreements is to the effect that they may be modified by subsequent agreements entered into in the

process of collective bargaining. *Hartley vs. Brotherhood of Railway and Steamship Clerks, supra; O'Keefe vs. Local 463, supra; Donovan vs. Travers, supra; George T. Ross Lodge vs. Brotherhood of Railroad Trainmen, supra; Aulich vs. Craigmyle, supra; McMurray vs. Brotherhood of Railroad Trainmen,* 50 Fed. 2d 968; *Ryan vs. New York Central Railroad Company,* 267 Mich. 202, 255 N. W. 365; *Boucher vs. Godfrey,* 119 Conn. 622, 178 A. 655; *Harris vs. Missouri Pacific Railroad Company,* 1 Fed. Supp. 946; *Aden vs. Louisville & Nashville Railroad Company,* 276 S. W. 511; *Lockwood vs. Chitwood,* 185 Okla. 44, 89 P. (2d) 951; *Evans vs. Johnston,* 300 Ill. App. 78, 20 N. E. (2d) 841.

Certainly when Congress made the settlement of disputes a duty under the Railway Labor Act, it must have contemplated that the performance of such duty would involve the compromising of adverse interests. It must have understood that the settlement of disputes by the collective bargaining process would not in every case result in an agreement satisfactory to every person who might be affected thereby, any more than basic working agreements arrived at by collective bargaining can be entirely satisfactory to every individual employee, carrier or collective bargaining representative. Yet Congress has given its wholehearted approval to the process of collective bargaining, in enacting the Railway Labor Act and other statutes.

In view of the above considerations, the petitioners here contend that when the collective bargaining process has in good faith produced an agreement settling a dispute or grievance, an individual should not be heard, either by the state or federal courts, to complain that he has been damaged by the settlement. If such complaints are to be sustained, collective bargaining and the settlement of disputes under the Railway Labor Act will be critically hampered. When a carrier and the duly designated and au-

thorized representative of its employees have reached an agreement of the type contemplated by the Railway Labor Act, that agreement must be recognized as binding upon the carrier and the individual employees whose representative negotiated it, except only those instances where the protection of the Congressional mandate must be denied to a particular agreement on the ground that its terms were inspired solely by malice, or fraud.

4. The Statement by the New Jersey Court of Errors and Appeals That the Question of Representation Was Not Necessary to the Determination of This Case Did Not Deprive This Court of Jurisdiction Under Section 237 of the Judicial Code

The opinion of the New Jersey Chancery Court supporting its decree (the decree affirmed by the New Jersey Court of Errors and Appeals) appears to proceed solely on the theory that the Brotherhood was not the authorized collective bargaining representative of the employees of the Lehigh Valley Railroad Company. This theory seems in turn to be based entirely on the conclusion that, to act as such representative, the Brotherhood must have been certified as such representative by the National Mediation Board, and that such certification must have been based upon an election conducted under the auspices of the Board. The theory upon which the Chancery Court proceeded, appears in the following portions of its opinion:

> "The Brotherhood's attitude is wholly unwarranted and plainly discriminatory. It was never designed or elected as the bargaining agent." (R. 215.)

> "By reason of this law (the Railway Labor Act) a carrier or railroad cannot substitute and recognize a new bargaining agent where the class is presently represented by a bargaining agent on the purported proof that the 'new bargaining agent' represents the

majority of the employees of the class without an election under the supervision of the National Mediation Board." (R. 219.) (Portion in parentheses not a part of quotation.)

"The recognition of the defendant Brotherhood as bargaining agent by the Railroad was obviously unjustified, an arbitrary assumption of authority and a direct violation of the statute aforesaid (Railway Labor Act)." (R. 219.) (Portion in parentheses not a part of quotation.)

The following portions of the decree of the Chancery court also show that it did in fact pass directly on the question of representation:

"The action of the defendant Brotherhood in interceding for John Trainor, Hans Peterson and James Coffey, and in obtaining their reinstatement with a restoration of their original seniority rights was wholly unwarranted *as the said defendant Brotherhood was never designated or elected as the bargaining agent* and it was in violation of the provisions of the agreement effective April 1, 1935." (R. 224-225.) (Emphasis supplied.)

"The Mediation Board never certified the defendant Brotherhood as the bargaining agent for the clerical employees of the defendant Railroad. *Under the circumstances,* it was without authority to intercede or act in any manner to restore the seniority rights of Coffey, Trainor and Peterson." (R. 225.) (Emphasis supplied.)

The portions of the decree above quoted infer that had the Brotherhood been certified by the Mediation Board, it would have had the authority to intercede for these men. Furthermore, nowhere in its opinion or decree does the Chancery court state that if the Brotherhood was the authorized representative of the Railroad's clerical employees, it would not have been entitled to make the agreement which was held null and void by the Chancery court's decree. In the absence of such a statement, and in view of

the language of the Chancery court's opinion and decree, it is apparent that the New Jersey Court of Errors and Appeals erred in stating that the question of representation was not necessary to the determination of this case.

Such being the situation, the question remains as to whether, while affirming the decree of the Chancery court, the New Jersey Court of Errors and Appeals could, by merely stating in its opinion that the question as to the right of the Brotherhood to represent the Railroad's clerical employees was not necessary to the determination of the case, avoid the right of this court, under Section 237 of the Judicial Code, to review its decree. This question has been answered several times by this court. In the case of *Ward vs. Love County,* 253 U. S. 17, 64 L. Ed. 751, 40 S. Ct. 419, the opinion of this court contained the following language:

> "The right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether the right was denied, or not given due recognition, by the supreme court, is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of decision that were without any fair or substantial support * * *. Of course, if non-Federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided. * * * With this qualification, it is true that a judgment of a state court, which is put on independent non-Federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one, and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." (253 U. S., pp. 22-23.) (Citations omitted.)

In the instant case, petitioners submit that the decree sought to be reviewed here was not predicated upon any non-Federal grounds. In view of the repudiation of the representation question by the New Jersey Court of Errors and Appeals, the decree now appears to be based upon no ground whatever. We can only infer, then, that the repudiation of the representation question must be overlooked, and the decree placed squarely on the Chancery court's construction of the Railway Labor Act.

Another decision by this Court, setting up a rule similar to that in the case of *Ward vs. Love County, supra*, is the holding in *Norris vs. Alabama*, 294 U. S. 587, 79 L. Ed. 1074, 55 S. Ct. 579. In taking jurisdiction to decide whether rights had been denied by the state court's erroneous application of a constitutional principle, this court said:

> "The question is of the application of this established principle to the facts disclosed by the record. That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." (294 U. S., pp. 589-590.) (Citations omitted.)

It would appear, therefore, that the language of the opinion of the New Jersey Court of Errors and Appeals, in the instant case, may not be relied upon to avoid this court's power of review, when in fact that court's decision

affirmed a decree determining rights under an interpretation of a federal statute, the Railway Labor Act, which is clearly erroneous.

CONCLUSION

As is the case in all large industries, large scale operations cannot be conducted by the railroad industry without resultant varied and complex problems involving the relationship between employers and employees. Both from the point of view of labor and of management, it is essential that there be some means whereby these problems may be mutually considered and, if possible, amicably adjusted. It was the aim of the Congress of the United States, in enacting the Railway Labor Act, to provide such means. That Act provides, among other things, for the right of railroad employees to organize and bargain collectively through representatives of their own choosing. It also provides for the exertion of every reasonable effort to settle all disputes between employer and employees, whether or not such disputes arise out of collective bargaining agreement, through the medium of conferences between representatives of a carrier and of its employees.

In the foregoing discussion, we have shown how the decision of the New Jersey Court of Errors and Appeals in the instant case is in conflict with these provisions of the Railway Labor Act. The right of employees to organize and bargain collectively through representatives of their own choosing has been impaired by the New Jersey decision, in that the decision imposes certain restrictions or conditions not contemplated by the Act, upon the right of employees to choose their collective bargaining representative. The decision also stands opposed to the mandate of the Act with respect to the settlement of disputes, in holding null and void an agreement between the petitioners here in settlement of a dispute. If permitted to stand, the

decision of the New Jersey court would impair the effectiveness of collective bargaining in the railroad industry, and greatly curtail the benefits afforded to both labor and management by the Railway Labor Act.

It is therefore respectfully submitted that because of the novelty and far-reaching importance of the questions presented, this petition for a writ of *certiorari* to review the decision of the New Jersey Court of Errors and Appeals should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 207.

LEHIGH VALLEY RAILROAD COMPANY OF PENNSYLVANIA, a corporation, and BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, an unincorporated association,

Petitioners,

vs.

PATRICK J. DOOLEY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Non-Compliance With Rules.

The petition lacks completely the statements and references to the record required by Rule 12, paragraph 1 of this Court in order to show that a federal question was duly presented, decided and saved for review by the petitioners.

Arguments in Reply to Petitioners' Points.

Point 1 of Petitioners' brief is as follows:

> **The decision of the New Jersey Court of Errors and Appeals operates to deny to certain employees of the Lehigh Valley Railroad Company the right to bargain collectively (Petitioners' brief, at page 17).**

The question to which this point is directed was neither raised nor decided below and nothing in the petition is cited to show that it was so raised by the petitioners, or dealt with in the grounds of appeal (R. 230-239, 242-248).

It is argued that the injunction forbidding the Brotherhood to interfere with the existing contract fixing seniorities is an interference with the right of collective bargaining in the future, but the injunction has no such meaning (R. 227). If and when the Brotherhood acquires the right in the future to alter the contract it can unquestionably do so. The court did not enjoin the Brotherhood from seeking to be elected or designated as collective bargaining agent hereafter. Obviously it could not do so.

There is not a word in the case to show that the Association which had negotiated the contract for Dooley's seniority was "defunct". It was not in fact "defunct", as will be seen in the petitioners' own statement of facts (page 8), where it is shown that this "defunct" Association disputed the right of the Brotherhood to represent the clerical employees of the Railroad, and came off victorious through a dismissal of the proceedings by the National Mediation Board (Exhibit C-21, R. 351, offered in evid. R. 172). But whether it was "defunct" or not was irrelevant. It had negotiated the contract and the contract

was still subsisting. This contract had not been made with the so called "defunct" Association but had been made directly with the employees who were parties in the litigation (R. 274, Ex. C-3, offered in evidence R. 23).

Point 2 of the Petitioners' brief is as follows:

> **The decision of the New Jersey Court of Errors and Appeals adopts an erroneous construction of the Railway Labor Act, in holding that certification by the National Mediation Board is a prerequisite to the right to represent employees of a carrier (Petitioners' brief, at page 19).**

Six pages of the brief are given to the argument that it was error to hold that the Brotherhood should have been certified by the National Mediation Board as bargaining agent. One might suppose from this that the lack of a certification was the only ground relied on by the court, whereas the record shows that the court also found that the Brotherhood had never been elected or designated as bargaining agent (R. 224, 225). The absence of a certification became an unimportant matter when it was thus found that after a dispute the National Mediation Board had dismissed the proceeding without either an election or designation of the Brotherhood as bargaining agent (R. 218, 219).

The federal question whether the Brotherhood had been duly elected or designated as an agent authorized to bargain collectively for the Railroad employees was of course involved and the court decided, in the respondent's favor, that the Brotherhood had neither been elected nor designated as a bargaining agent for employees of the Railroad. This decision was never challenged by any assignment in the grounds of appeal (R. 230-239, 242-248).

Point 3 of Petitioners' brief is as follows:

> **The decree operates to impair the right and duty under Section 2 first and second of the Railway Labor Act of both the Lehigh Valley Railroad Company and its employees to settle all disputes (Petitioners' brief, at page 25).**

The question to which this point is directed was neither raised nor decided below and nothing in the petition is cited to show that it was so raised by the petitioners, or dealt with in the grounds of appeal (R. 230-239, 242-248).

This point has no relation to the facts of the case. Dooley's right of seniority was never in dispute until the Brotherhood, having no authority to do so, authorized the Railroad to abrogate Dooley's seniority. Instead of trying to "settle" a dispute the Brotherhood thus deliberately created a dispute by inducing the Railroad to commit a breach of its contract with Dooley and other employees.

Both the Brotherhood and the Railroad were therefore arrayed against Dooley and he had no recourse except by appeal to a court. Certainly the Brotherhood has no standing to invoke this federal statute when it itself was the cause of the dispute.

No federal question is presented by this point. The court below went no further than to decide the obvious fact that the Railroad and the Brotherhood had violated a plain agreement for seniority and should be enjoined from continuing to do so.

It is well settled that the question of construing the meaning and effect of a railroad's contract with its employees is one over which state courts have jurisdiction. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630; *Teague* v. *Brotherhood of Locomotive Firemen, Etc.*, 127 F. 2nd 53,

55 (C. C. A.); *Malone* v. *Gardner*, 62 F. 2nd 15 (C. C. A.); *Parrish* v. *Chesapeake & O. Railway Co.*, 62 F. 2nd 20 (C. C. A.) cert. den. 288 U. S. 604, 77 L. Ed. 979, 53 S. Ct. 397.

Point 4 of Petitioners' brief is as follows:

> **The statement by the New Jersey Court of Errors and Appeals that the question of representation was not necessary to the determination of this case did not deprive this Court of jurisdiction under Section 237 of the Judicial Code (Petitioners' brief, at page 29).**

It is true that state courts cannot shield their erroneous decisions from review merely by asserting that a federal question is not in the case, and this dictum of the Court of Errors and Appeals of New Jersey seems to be erroneous. It was in order for the Court of Chancery to decide the federal question whether the Brotherhood had obtained authority to deal with the question of seniority by being either elected or designated as bargaining agent for the employees. As above pointed out this simple federal question whether the Brotherhood had been elected or designated as bargaining agent was not saved for review in this Court by any appropriate ground of appeal (R. 230-239, 242-248).

Conclusion.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ should be denied.

Dated: August 14, 1942.

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